

Central Register as a Model Instrument to Unveil Beneficial Owners for Tax Purposes

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Abstract

This paper proposes the use of Central Register of Beneficial Owners (CRB) laid down in the Fourth Anti Money Laundering Directive (4MLD) as a model instrument towards identifying beneficial ownership in international tax law. Although the OECD affirmed in 2014 that the term 'beneficial owner' "must be distinguished from the different meaning...in the context of other instruments", the inclusion of tax evasion as a crime covered by the 4AMLD renders the CRB valuable in solving tax treaty cases on beneficial ownership.

Purposively, the use of CRB greatly supports the EU tax transparency agenda, which requires that Member States actively engaged in Exchange of Information (EoI) cooperation. The effectiveness of EoI is ensured by, among others, the accurateness of information stored in each Member States. The CRB also calls for protection of taxpayers data, as access to it can only be granted to parties with legitimate interests, and must accord with the secondary laws on data protection. The coherence of these policies strongly supports for wider and optimized use of CRB in the future.

Keywords: central register; beneficial owner; tax treaty

1. Introduction

The insertion of the term 'beneficial owner' into the 1977 OECD Model Tax Conventions on Income and Capital (OECD MC) had led to uncertainty as to the meaning of the term within the implementation of bilateral tax treaties. Case laws brought before courts in different jurisdictions have attempted at ascertaining the meaning of the term and implementing that meaning in the present case in accordance with facts and circumstances upheld during the trials. For tax authorities of the state in which the income is sourced, judgments of these cases will determine whether the granting of treaty benefits (e.g. withholding tax rates that is lower than the rates prescribed in domestic income tax law) accords with the genuineness of the underlying transactions performed by taxpayers. Meanwhile, for the taxpayers, including multinational corporations, judgments of these cases will determine whether the allocation of substantive business activities to its entities located in different jurisdictions have satisfied an acceptable level of international tax planning.

Evolution of the term have witnessed no less than 2 landmark cases, namely *Indofood International Finance, Ltd. v JPMorgan Chase Bank N. A., London Branch*, UK Court of Appeal [2006] EWCA Civ 158, and *Her Majesty the Queen v. Prévost Car Inc.* Tax Court of Canada (2008TCC231). As observed by Castro,¹ the approach used in the former is closest to anti-avoidance measure, whereas in the latter case, the judge deployed more efforts as to assert meaning to the term 'beneficial owner', as well as defining the role and scope of intermediary holding corporations. He further argued, however, that these cases did not contribute in resolving the combining issues of "(...) lack of express definition in OECD MC and its commentaries, together with doctrinal discussion on the legal or economic approach to its concept, added the intersection of this subject with anti-abuse measures".² In any circumstance, the above UK and Canada cases have taught us that a person beneficial owner will have "the full privilege to directly benefit from the income"³ and subject to "use, enjoyment, risks, and control" of the income.⁴

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¹ Leonardo F. M. Castro, "Concept of Beneficial Owner in Tax Treaties: Separating the Wheat from the Chaff through Case Law Method Internationally", *International Tax Journal*, July–August 2013, at p.25.

² Leonardo F. M. Castro, *id.*

³ *Indofood International Finance, Ltd. v JPMorgan Chase Bank N. A., London Branch*, para. [42].

Without undermining the judicial efforts devoted to define the term, legislative efforts have also been deployed by states as to lay down measures that are able to pinpoint beneficial owners in cross-border income transactions. Within the EU, references to beneficial owner can be found in its secondary law, namely Directive 2015/849/EU⁵ of 20 May 2015, or the Fourth Anti-Money Laundering Directive (4AMLD). The EU Commission Proposal COM(2016)450 of 5 July 2016⁶ has set up for the fifth amendment of the AMLD. As an instrument designed to simultaneously combat money laundering, tax evasion, and financing of terrorism, implementation of the instrument raises the issue as to whether it is of value in addressing the issue of beneficial ownership for bilateral tax treaty purposes. The absence of a specific directive on the latter issue, however, renders the 4AMLD being the primary resort.⁷

Identification of beneficial owners within the 4AMLD is done through a centralized registration of beneficial owners. These registers are to be held in each Member State. This paper seeks to establish that these registers are valuable within initial analysis towards identifying beneficial owner for bilateral tax treaty purposes. Furthermore, this paper argues that the Central Register of Beneficial Owners (hereinafter, the CRB) may become a model instrument in unveiling beneficial ownership for tax treaty purposes. Although the EU territoriality principle limits the scope of application of the instrument within its territories, key elements forming the instrument are unrestricted for adoption by other states outside the EU. It is conceded that data and information extracted from the registers are not in themselves able to resolve the beneficial ownership dispute in a given tax case. Legal and economic circumstances of each transaction must also be taken into consideration when determining beneficial ownership. Meanwhile, the accuracy and protection of taxpayers' information currently developed within the CRB may as well establish legal certainty towards the issue of beneficial ownership in international tax law.

Contextually, the use of CRB for tax treaty purposes are strongly linked to the EU tax transparency agenda, including exchange of information cooperation and protection of taxpayers data. As will be discussed in the next section, the agenda requires that Member States, by virtue of the Council Directive 2011/16/EU of 15 February 2011,⁸ are engaging in mutual exchange of information for tax purposes. In doing so, Member States must also maintain that every data subject, including taxpayers, is entitled to a certain level of protection prescribed in Directive 2016/680/EU of 27 April 2016.⁹ Simultaneously, this Directive also limits the use of data and information stored in the CRB. Practically, access to the CRB can be granted only to persons with legitimate purpose, although one may argue that wider access to the register may improve accuracy of information.

⁴ *Her Majesty the Queen v. Prévost Car Inc.* Tax Court of Canada (2008TCC231), para. [100].

⁵ Directive of the European Parliament and of the Council 2015/849/EU of 20 May 2015 on the prevention of the use of financial system for the purposes of money laundering or terrorist financing amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/060/EC of the European Parliament and of the Council and Commission Directive 2006/070/EC, [2015] OJ L141/73, or the 4AMLD. Relevant secondary laws include Directive of the European Parliament and of the Council 2009/101/EU on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of article 48 of the Treaty, with a view to making such safeguards equivalent, 16 September 2009, [2009] OJ L258/11.

⁶ The European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC, 5 July 2016, COM(2016)450 final.

⁷ The term 'beneficial owner' was not, for example, addressed in Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (the Anti-avoidance Directive), [2016] OJ L193/1.

⁸ Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, [2011] OJ L 64/1, or the Administrative Cooperation Directive.

⁹ Directive 2016/680/EU of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, [2016] OJ L 119/89.

Based on the above elaboration, the central question of this paper is “can the EU CRB be used as a model instrument in unveiling beneficial owners for tax treaty purposes?” In order to answer the question, analysis of this paper is devoted to factors that may support the use of CRB as model instrument in unveiling beneficial ownership for tax purposes. A normative study would be deployed as to determine whether the CRB may be used as a model instrument in unveiling beneficial ownership for tax purposes. It does not, therefore, include practical experiences of the CRB, if any. Current developments reveal that the Council is still within intensive communications with the Parliament in adopting the Fifth Anti-Money Laundering Directive, which included enhanced policies on access to the CRB. The fifth President-compromised texts to the proposal includes stronger commitment to the rights of individuals to privacy, while maintaining that Member States should, for the objective of enhancing “(...) transparency of business transactions and financial system,” grant wider public access to the CRB.¹⁰ The proper balancing to such public access is achieved through online registration of requesting parties, and to fully abolished the possibility to grant access to authorities of third states.¹¹

2. Central registration as model instrument to unveil beneficial owner of income

In this section, factors that support the use of CRB as instrument in unveiling beneficial owners for tax purposes will be analyzed. First, the comprehensiveness of information to be stored into the CRB. Details on the legal and economic nature of cross-border business transactions determine the usefulness of the CRB for tax purposes. Second, the transparent and practical use of data and information stored in the CRB. The crucial policy choice in this matter is whether to restrict or to grant wider access to the CRB. Restrictive access leads to higher protection to individuals’ privacy, whereas wider access may improve the quality and quantity of information stored in the CRB. Contextually, coherent tax transparency policies have enabled the CRB to play an important role in unveiling beneficial ownership for tax purposes. The established links amongst rules and regulations on exchange of information for tax purposes, data protection, and anti-money laundering have improved the usefulness of the CRB in unveiling beneficial ownership for tax purposes. Third, the protective measures to prevent misuse of taxpayers information. This is done not only by acknowledging the rules and regulations on data protection, but also the use of “legitimate interest” measure in granting access to the CRB. Safe transmission and limitations on information exchange are also key elements. The objective of this section is to establish that the CRB should indeed be a model instrument in unveiling beneficial ownership for tax treaty purposes.

2.1. Comprehensiveness of beneficial ownership information stored within the CRB

The effort to hold a centralized registration of beneficial owners is derived from, among others, the idea that it is necessary to “(...) identify any natural person who exercises ownership or control over legal entity”.¹² Valid and recent information on beneficial owners “(...) is a key factor in tracing criminals who might otherwise hide their identity behind a corporate structure”.¹³ For that objective, Member States are obliged to acquire and maintain data and information on beneficial ownership, as prescribed in Article 30 of the 4AMLD. Furthermore, these data and information must be held in “adequate, accurate, and current” manners (Article 30(4) of 4AMLD) and must include the information on the “beneficial interests held” (Article 30(1) of 4AMLD). As a measure to unveil beneficial owners, the CRB may contain data and information that best determine legal ownership of assets from which income might be generated. When combined with other data and information on economic circumstances of the transaction, then one is able to determine whether taxpayers in different jurisdictions are performing legitimate transactions or only for the purpose of benefiting from provisions of bilateral tax treaties.

¹⁰ The European Council, Fifth Presidency Compromise to COM(2016)450, 15605/16, 19 December 2016, at Preamble para. [35] and para. [35a].

¹¹ The European Council, id., at Preamble para. [22a] and para. [35a].

¹² The 4AMLD, at Preamble para. [12].

¹³ The 4AMLD, at Preamble para. [14].

Within the EU, Article 3(6) of 4AMLD defines beneficial owner as “any natural person(s) who ultimately owns or controls the customer and/or the natural person(s) on whose behalf a transaction or activity is being conducted”. The key element of this definition is “control”, which is determined by way of share ownership, voting rights, ownership interests, and “control via other means”.¹⁴ Entities upon which control is exercised in this directive include corporations, trusts, and other legal entities such as foundations. In the case of corporations, the Commission has proposed a more restrictive shareholding requirement for entities that “(...) are mostly used as an intermediary structure between the assets or income and the ultimate beneficial owner”, which can be distinguished from those which are “(...) genuine commercial corporate entities”.¹⁵ The directive obliges Member States to expand the scope of legal entities and lay down more restrictive shareholding requirement in order to establish “effective transparency”.¹⁶

It should be acknowledged that the OECD had, in its 2014 Update on the OECD Model Tax Conventions on Income and Capital (OECD MC), affirmed that the meaning of “beneficial owners” within Article 10, 11, and 12 on cross-border payment of dividends, interests, and royalties¹⁷ “(...) must be distinguished from the different meaning that has been given to that term in the context of other instruments that concern the determination of the persons (typically the individuals) that exercise ultimate control over entities or assets”.¹⁸ The main concern of the OECD was that references of beneficial owners to individuals having the eventual control over a corporation would not specifically solve the issue arises from the use of the words “paid to” as concerns payment of dividend, interests, and royalties, but instead the issue related to the ownership of the underlying shares, debt-claims, property or rights.¹⁹ Nevertheless, the inclusion of tax evasion as a crime to be fought against by the 4AMLD indicate its enlarged scope of application to tax matters, larger than that set out by the FATF report. The Commission opined that it is essential to highlight that ‘tax crimes’ relating to direct and indirect taxes are included in the broad definition of ‘criminal activity’ in the 4AMLD, as suggested in the revised FATF Recommendations.²⁰

As regards specification of data and information to be acquired by entities established in any Member State, the 4AMLD specified some types of information that may be useful in unveiling beneficial ownership, namely “(...) the name, the month and year of birth, the nationality and the country of residence of the beneficial owner as well as the nature and extent of the beneficial interest held”.²¹ Apparently, these types of information have a face value to unveil legal ownership, as distinguished from beneficial ownership. In order to be able to pinpoint beneficial owners of assets and income, Member States must enhance their laws as to ensure that customer due diligence performed by financial entities established in their territories are able to reveal the economic nature of transactions performed by the latter’s customers. This may include information concerning all entities and natural persons associated with an entity of a Member State. As for transactions involving persons domiciled in “high-risk third states”,²² obliged entities must seek for further information concerning, among others, the “intended nature of business relationships”, “source of funds or source of wealth of customers”, and “reasons for the intended or performed transactions”.²³

¹⁴ The 4AMLD, Article 3(6)(a)(i).

¹⁵ The European Commission, COM(2016)450, supra 6, p.19, at para. [18].

¹⁶ The 4AMLD, at Preamble para. [12].

¹⁷ OECD, “2014 Update to the OECD Model Tax Convention”, revised para.12.6 of commentary on Article 10, revised para.10.4 of commentary to Article 11, and revised para.4.5 of commentary on Article 12.

¹⁸ The Financial Action Task Force (FATF) Recommendations in its 2012 International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, is an illustration of that “other instruments”.

¹⁹ OECD, supra 17, revised para.4.5 of commentary on Article 12.

²⁰ The 4AMLD, at Preamble para. [11].

²¹ The European Council, supra 10, proposed amendment to Article 30(5) of the 4AMLD.

²² See: The 4AMLD, Article 9(2). See also: Commission Delegated Regulation (EU) 2016/1675 of 14 July 2016 supplementing Directive (EU) 2015/849 of the European Parliament and of the Council by identifying high-risk third countries with strategic deficiencies, [2016] OJ L 254/1.

²³ The European Council, supra 10, proposed insertion of Article 18a into the 4AMLD.

Based on the above provisions, it can be concluded that data and information on beneficial owners as prescribed in the 4AMLD and its proposed amendments have objectives beyond disclosure of legal ownership of assets and income, namely to unveil their beneficial owners. The multi purposes of the Directive is, however, preventing one from being able to conclude that fulfillment of beneficial owner requirements by virtue of this law will entitle (or, disregard) a person the benefits of bilateral tax treaties. Information such as source of funds or nature of business relationships are not in themselves able to deny tax benefits resulted from any tax avoidance scheme, the performance of which hinders the proper functioning of tax treaty provisions. Thus, a measure by which legal entities are obliged to identify beneficial owners of their shares and to identify their customers, whose assets and income are managed or flown through such legal entities, should only be utilized as an entry point for tax authorities or judiciaries to determine beneficial ownership of assets and income. Information within the CRB can reveal all entities involved in business transactions, but attribution of income and its subsequent taxation are matters to be settled through references to domestic and international tax laws.

It can be concluded from the above elaborations that the CRB is, to the extent of identification of potential persons having beneficial interests in assets or income, a useful instrument in addressing beneficial ownership issues found in double tax conventions. The types of information stored in the CRB are also inline with the typical information which, according to the OECD, would be of the interests of tax authorities, namely taxpayers' identity (e.g. name, address, taxpayer identification number, place and date of birth), (financial) account number, the account balance or value, and total gross amount of (depository account) interests.²⁴ The OECD's concern that individuals' effective control of assets and income—being the object of CRB—would be insufficient in addressing tax treaty cases involving corporation beneficial owners, may not entirely be accepted.²⁵ It is worth noting that the 4AMLD has acknowledged that “(...) identification and verification of beneficial owners should, where relevant, extend to legal entities that own other legal entities”.²⁶ It is, therefore, conclusive that the CRB cannot be disregarded as a tool for unveiling beneficial owners for the sole reason of not having corporation beneficial owners as its main object. In fact, this would be the ideal approach to identify beneficial owners of closely-held corporations.

Data and information acquired from financial entities are pooled in a centralized registration of beneficial owners. This register, which is to be held “(...) in a central register located outside the company”,²⁷ represents a recent attempt to identify beneficial ownership, particularly in the EU. The comprehensiveness of data and information stored in the CRB is therefore also assured by the implementation of the exchange of information in the field of taxation as governed in the Administrative Cooperation Directive. For the purposes of that Directive, exchange of information is performed “(...) based on a request made by the requesting Member State to the requested Member State in a specific case”.²⁸ Amongst the information that can be requested is “(...) ownership of and income from immovable property”.²⁹ Implementation of this directive also corresponds to Council Directive 2010/24/EU of 16 March 2010.³⁰

²⁴ OECD (2014), “Standard for Automatic Exchange of Financial Account Information in Tax Matters”, OECD Publishing, <http://dx.doi.org/10.1787/9789264216525-en>, Model Competent Authority Agreement, Section 2(1).

²⁵ OECD, “2014 Update to the OECD Model Tax Convention”, *supra* 17, revised paragraph 12.3 of commentary to Article 10, revised para. 10.1 of commentary to Article 11, revised para. 4.2 of commentary to Article 12. In that paragraph, the OECD argued that “(...) a conduit company cannot normally be regarded as the beneficial owner if, though the formal owner, it has, as a practical matter, very narrow powers which render it, in relation to the income concerned, a mere fiduciary or administrator acting on account of the interested parties”.

²⁶ The 4AMLD, at Preamble para. [13].

²⁷ The 4AMLD, at Preamble para. [14].

²⁸ Administrative Cooperation Directive, Article 3 number 8.

²⁹ Administrative Cooperation Directive, Article 3(1)(e).

³⁰ Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, [2010] OJ L 84/1, or the Mutual Assistance Directive.

It is therefore worth seeking whether information stored in the CRB are useful for the upcoming exchange of tax information cooperation. Within the latter cooperation, the types of acquired and transmitted information vary according to the mode of information exchange. Within the exchange of information by request,³¹ there is virtually no limitations as to which data and information can be acquired and transmitted. Article 5(1) of Administrative Cooperation Directive confers that the requested authority of Member State must inform the requesting authority of a Member State any information that it possesses or obtains which are of foreseeable relevance to the administration and enforcement of domestic laws of Member State of the requesting authority.³² Similarly, types of information acquired and transmitted within the spontaneous exchange of information³³ are also limitless, except that such exchange mode can only be deployed on specific occasions, including when a transaction involves persons interposed between principal actors located in the sending Member State and the receiving Member State.³⁴ On this occasion, information extracted from the CRB may be of useful in identifying interposed persons within cross-border transactions. Lastly, any information available in the tax files of a Member State which is retrievable in accordance with the procedures for gathering and processing information in that Member State³⁵ may be transmitted for the purpose of automatic exchange of information.³⁶ The specific reference to “tax files of Member State” has reduced the usefulness of CRB in this mode of information exchange, as information within the CRB are not filed by tax authorities of Member States, but rather financial entities located in Member States. Extension of the CRB as to reach tax files in all Member States will enrich the information bulk in the CRB.

Based on the above elaboration in subsection 2.1., it can be concluded that the holding of CRB strongly links to the exchange of tax information cooperation within the EU. Information stored in the CRB forms major part of information that may be transmitted within the information exchange cooperation. Efforts deployed in obtaining and maintaining accurate and current information on taxpayers information are tantamount to those deployed in establishing an effective information exchange cooperation in order to safeguard the EU budgetary functions. Inherent to that proportion, on 5 July 2016, the Commission has proposed for amendment of Administrative Cooperation Directive as regards access to anti-money laundering information by tax authorities.³⁷ The proposed amendment³⁸ had included the plea for access to beneficial ownership information, which is aggregated in CRB of each Member State, to fall within the scope of Administrative Cooperation Directive. This proposal will harness the link between the Administrative Cooperation Directive and the Anti-Money Laundering Directive. For the purpose of this article, this established link supports for the use of CRB as model instrument in unveiling beneficial ownership.

³¹ Article 3 point 8 of Administrative Cooperation Directive defines ‘exchange of information by request’ as “the exchange of information based on a request made by the requesting Member State to the requested Member State in a specific case.

³² Administrative Cooperation Directive, Article 1(1).

³³ Article 3 point 10 of Administrative Cooperation Directive, defines ‘spontaneous exchange’ as “the non-systematic communication, at any moment and without prior request, of information to another Member State.”

³⁴ Other purposes for spontaneous exchange of information are: a) existence of grounds for suspecting tax loss occurring in the receiving Member State; b) deduction or exemption in a Member State that may affect taxing rights of the receiving Member State; c) existence of grounds for suspecting the use of artificial profits transfers amongst members of a multinational corporation, and d) usefulness of information for the assessment of tax liability. See: Administrative Cooperation Directive, Article 9(1).

³⁵ In particular, information regarding income from employment, director’s fees, certain life insurance products, pensions, and ownership of and income from immovable property received after 1 January 2014 by residents of the receiving Member State. By 1 July 2017, before which the Commission has to issue an overview report of the cooperation, these taxable objects will be added as to include dividends, capital gains, and royalties See: Administrative Cooperation Directive, Article 7(1) *juncto* Article 8(5).

³⁶ Article 3 point 9 of Administrative Coop. Directive defines ‘automatic exchange’ as “the systematic communication of predefined information to another Member State, without prior request, at pre-established regular intervals.”

³⁷ The European Commission, Proposal for a Council Directive amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities, COM(2016) 452.

³⁸ *id.*, proposed insertion of paragraph (1a) of Article 1 of the Administrative Cooperation Directive.

2.2. Transparency and usefulness of information stored within the CRB

The holding of a CRB corresponds to the Commission's agenda for Fair Corporate Taxation,³⁹ particularly with due regards to establishing tax transparency. Tax transparency has been upheld as one of the three pillars of the EU Commission's agenda for Fair Corporate Taxation, alongside establishing effective taxation and better business environment.⁴⁰ Historically, an EU-wide automatic exchange of information was introduced through the enactment of Council Directive 2003/48/EC of 3 June 2003.⁴¹ The Directive operates as to oblige automatic data transfer amongst Member States, particularly when savings interests are paid by paying agents to individual residents of the EU.⁴² Within later stages, exchange of information has also been used as instrument for the recovery of tax claims through the provisions laid down in the Mutual Assistance Directive. Under that directive, a requested authority of a Member State is obliged to provide information that are relevant to the recovery of tax claims by requesting authority of another Member State.

An expanded EU cooperation on automatic exchange of information took place after the Administrative Cooperation Directive was enacted. Similar to the Mutual Assistance Directive, this directive obliges a requested authority in a Member State to, with certain exceptions, provide information that are of foreseeable relevance to the requesting authority in another Member State in the administration and enforcement of domestic tax laws of the latter Member State. In this directive, exchange of information among Member States is classified based on its scope of application, and comprises of exchange of information on request, mandatory automatic exchange of information, and spontaneous exchange of information. As observed by Helminen,⁴³ the Administrative Cooperation Directive was issued due to practices of cross-border tax avoidance which leads to "(...) budget losses and prevents proper assessment of taxes and, thus, may distort the proper operation of the internal market."

It is admitted by the Council that management of a Member State's internal tax system cannot be properly performed without receiving information from other Member States.⁴⁴ In this context, the subsidiarity [SIC] principle of the TFEU requires that since an efficient administrative cooperation between Member States to overcome the negative effects of globalization cannot be sufficiently achieved by the Member States themselves, then it is better be achieved at the EU level.⁴⁵ The Administrative Cooperation Directive, therefore, marks the EU's firm and extensive move towards fiscal transparency and information exchange.⁴⁶ Amendments to the directive include extensions of its scope to financial account information,⁴⁷ information on cross-border tax rulings and advance pricing arrangements,⁴⁸ and country-by-country reporting.⁴⁹ Along with the information stored in the CRB, information obtained within the information exchange cooperation ensure the establishment of tax transparency within the EU.

³⁹ The European Commission, "Commission's Agenda for the Fair Corporate Taxation in the EU", available at http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/company_tax/anti_tax_avoidance/timeline_without_logo.png [last access 20 June 2017]. It does not, however, encompass tax avoidance. The 2016 Anti-Avoidance Directive makes reference primarily to the 15 OECD Actions against BEPS.

⁴⁰ The European Commission, id.

⁴¹ Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments, [2003] OJ L 157/38, or the Savings Directive.

⁴² Alicja Brodzka, "Automatic Exchange of Tax Information in the European Union—The Standard for the Future", 56 *European Taxation* 1, January 2016, at p.27.

⁴³ Marjaana Helminen, 2015. *EU Tax Law—Direct Taxation*, IBFD, Amsterdam, at p.318.

⁴⁴ Administrative Cooperation Directive, Preamble para. [2].

⁴⁵ Administrative Cooperation Directive, Preamble para. [29].

⁴⁶ Alicja Brodzka, supra 42, p.30.

⁴⁷ Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards Mandatory Exchange of Information in the Field of Taxation, [2014] OJ L359/1.

⁴⁸ Council Directive 2015/2376/EU of 8 December 2015 amending Directive 2011/16/EU as regards Mandatory Exchange of Information in the Field of Taxation, [2015] OJ L332/1.

⁴⁹ Council Directive 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards Mandatory Exchange of Information in the Field of Taxation, [2016] OJ L146/8.

Meanwhile, the usefulness of the CRB in identifying beneficial owners can be explained by the Commission's efforts to enhance rules on public access to beneficial ownership information. The 2016 proposal to amend the 4AMLD has developed rules concerning access to data and information stored in the CRB. In this regard, Council Directive 2016/2258⁵⁰ has obliged Member States to grant tax authorities access to mechanisms, procedures, documents, and information collected by virtue of the 4AMLD, including beneficial ownership information as registered within the CRB. In addition, recent developments on the draft amendment to the 4AMLD suggested that information on the name, date of birth, nationality, business or service address, beneficial owner's country of residence, and the nature and extent of the beneficial interests held should be publicly available.⁵¹ In the case of trusts that represent "(...) property held by or on behalf of a person carrying on a business which consists of or includes the management of trusts, and acting as trustee of a trust in the course of that business with a view to gain profit (...)",⁵² access to the CRB is restricted to "parties holding legitimate interest."

Within the Fifth Presidency Compromise to the proposed amendment to the 4AMLD, the legitimate interest requirement has been addressed in multiple occasions. Amongst the most notable addresses by the Council is its affirmation that a person having demonstrated a legitimate interest should be granted access into the CRB for the purpose of "(...) trust in the integrity of the financial system", and in order to assist criminal proceedings on money laundering, associated predicate offences and terrorist financing.⁵³ While omitting tax authorities of third states as persons having legitimate interests, the Council had ordered Member States to establish their own definitions and criteria of persons having legitimate interests.⁵⁴ This includes any negative lists of such persons, if a Member State wishes to formulate so. A problem persists when an entity of a Member State, having a legitimate interest in the Member State in which it is located, is not granted access to information concerning another entity in a different Member State through the interconnected CRB for the sole reason that the former entity is not, according to the laws of the Member State in which the latter entity is located, a person with legitimate interest. This is true, as the Council affirmed that "(...) both national and cross-border access to each Member State's register shall be granted based on the definition of legitimate interest of the Member State where the corporate or other legal entity is incorporated or where the trust or similar legal arrangement is administered."⁵⁵

Based on the above elaboration in subsection 2.2., it can be concluded that transparency of the CRB regime is manifested by the ongoing exchange of information cooperation, particularly amongst EU Member States. Rules and regulations on such cooperation have been linked to the efforts in establishing a CRB. The holding of a CRB corresponds to the bigger EU agenda of establishing tax transparency, being one of the three pillars of the EU Commission's agenda for Fair Corporate Taxation. Meanwhile, the usefulness of the CRB in identifying beneficial owners lies within its rules in accessing data and information within the CRB, including the access granted tax authorities of Member State in which the CRB is held. However, whether the access would be granted restrictively to persons with legitimate interests or publicly available remains to be decided by the legislative bodies of the EU. One drawback of the "legitimate interests" requirement is that the term 'persons with legitimate interests' may be defined differently in different Member States, and thus, granting access to these persons may become more difficult than it should be.

⁵⁰ Council Directive 2016/2258/EU of 6 December 2016 amending Directive 2011/16/EU as regards access to anti-money laundering information by tax authorities, [2016] OJ L342/1.

⁵¹ The European Parliament, Report on the proposal for a directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC, 9 March 2017, A8-0056/2017, p.66.

⁵² The European Commission, id., p.17. See also, The European Parliament, id., at p.98. The Parliament added that "a legitimate interest could be envisaged where the beneficial owner or the trustee has a public function or has had a public function in the last five years."

⁵³ The European Council, Fifth Presidency Compromise to COM(2016)450, supra 10, at Preamble paragraph [22].

⁵⁴ The European Council, id., at Preamble paragraph [35].

⁵⁵ The European Council, id., at Preamble paragraph [35].

2.3. Protection of personal information stored within the CRB

Another factor that supports the use of CRB as model instrument in unveiling beneficial ownership is its capability of protecting personal information. It should first be noted that references to EU secondary laws on data protection of natural persons can be made to General Data Protection Regulation (GDPR)⁵⁶ and Directive (EU) 2016/680.⁵⁷ While the former law applies to the processing of personal data and rules related to free movement of data,⁵⁸ the latter is particularly intended for the processing of personal data by competent authorities for the purposes of, among others, prevention, investigation, detection, or prosecution of criminal offences.⁵⁹ The scope of these laws are distinguished based on the purpose and principal processing actors. Within the proposed amendment to the 4AMLD, Directive (EU) 2016/680 was explicitly mentioned in paragraph 32 of the Preamble. The Presidency-compromised texts had also included a new objective of protecting personal information stored within the CRB.⁶⁰

General limitations on the use of CRB by persons with legitimate interests may be inferred from the GDPR. Paragraph 111 of the Preamble to the GDPR explains:

“(…) Provision should also be made for the possibility for transfers where important grounds of public interest laid down by Union or Member State law so require or where the transfer is made from a register established by law and intended for consultation by the public or persons having a legitimate interest. In the latter case, such a transfer should not involve the entirety of the personal data or entire categories of the data contained in the register and, when the register is intended for consultation by persons having a legitimate interest, the transfer should be made only at the request of those persons or, if they are to be the recipients, taking into full account the interests and fundamental rights of the data subject.”

This provision accords with the proposed amendment of the 4 AMLD which included the use of data and information contained in central registration of beneficial owners in each Member State. Paragraph 112 of the Preamble to the GDPR continues:

“Those derogations should in particular apply to data transfers required and necessary for important reasons of public interest, for example in cases of international data exchange between competition authorities, tax or customs administrations, between financial supervisory authorities (…)”

The protection of personal information stored within the CRB is primarily related to the storage and transmission of information. Issues within information storage mainly concerns the necessity to provide technical specifications for the interconnection of CRB, particularly: a) the technical specification defining the set of the technical data necessary for the platform to perform its functions as well as the method of storage, use and protection of such data; b) common criteria according to which beneficial ownership information is available through the system of interconnection of registers; c) the technical details on how the information on beneficial owners is to be made available; and d) the technical conditions of availability of services provided by the system of interconnection of registers.⁶¹

⁵⁶ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), [2016] OJ L 119/1.

⁵⁷ Directive 2016/680/EU of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, [2016] OJ L 119/89.

⁵⁸ Article 1(1) GDPR, *supra* 56.

⁵⁹ Article 1(1) Directive (EU) 2016/680, *supra* 57.

⁶⁰ The European Council, Fifth Presidency Compromise to COM(2016)450, *supra* 10, at Preamble paragraph [29]. The Council confers “with the same aim of ensuring a proportionate and balanced approach and to guarantee the rights to private life and personal data protection, Member States may provide for exemptions to the disclosure of and to the access to beneficial ownership information in the registers, in exceptional circumstances, where the information would expose the beneficial owner to the risk of fraud, kidnapping, blackmail, violence or intimidation.”

⁶¹ The European Council, Fifth Presidency Compromise to COM(2016)450, *supra* 10, proposed Article 31(a).

A rather more problematic issue concerns transmission of information, particularly within the exchange of information cooperation. As a general rule, information exchange cooperation for tax purposes insofar as expressly authorized by the EU organs and domestic tax laws of Member States. These derogations must, however, take into account the general concepts of profiling for data protection purposes, as set out in Paragraph 71 of the Preamble to the GDPR:

(...) decision-making based on such processing, including profiling, should be allowed where expressly authorized by Union or Member State law to which the controller is subject, including for fraud and tax-evasion monitoring (...).

Other than by provisions of the laws, acquisition and transmission of taxpayers data within information exchange cooperation for tax purposes are also bound by principles upheld in case laws of the Court of Justice of the EU. In this regard, Paragraph 34 of *Schrems* (Case C-362/14):⁶²

“The right to respect for private life, guaranteed by Article 7 of the Charter and by the core values common to the traditions of the Member States, would be rendered meaningless if the State authorities were authorized to access electronic communications on a **casual and generalized basis without any objective justification** based on considerations of national security or the prevention of crime that are specific to the individual concerned and without those practices being accompanied by appropriate and verifiable safeguards.” [emphasis added].

The above rules and principles serve as general limitations on the use of taxpayers information within the exchange of information cooperation. These rules and principles must then be manifested into the rules on transmission of information and other detailed limitations.

2.3.a. Safe transmission of personal information stored within the CRB

According to Brodzka,⁶³ the primary obstacles towards the exchange of information in the EU are the lack of experience in managing all of the phases within the data exchange, which may affect safe and proper storage of information bulk received and transmitted during the exchange. In this regard, modes of information exchange within the Administrative Cooperation Directive comprised of exchange of information by request, automatic exchange of information, and spontaneous exchange of information. Separate procedures apply for each mode of exchange. Within exchange of information by request, the requesting Member State initiates the information exchange by filing a standardized form, including any appendices such as reports, statements, and certified true copies.⁶⁴ This request must include the identity of the person under examination or investigation and the tax purpose for which the information is requested, and where identified, the name and address of the person in the requested state that might possess the information.⁶⁵ Thus, a request may not be conducted in casual and general fashion.

Pursuant to the request, the requested authority must promptly provide the information within six months after the receipt of the request, unless the requested information is already in possession of the requested authority for which the time limit is shortened into two months.⁶⁶ In responding to the request, the requested authority must use its domestic measures in order to obtain the requested information, even if such information would not be useful for its own use.⁶⁷ Furthermore, the requested authority may not refuse to supply information solely because the information is held for example by financial institutions, or because the information relates to ownership interests in a person.⁶⁸ At this point, it is possible that the requesting authority go beyond what is necessary to attain the objective of the information exchange, or in other words, being disproportionate.

⁶² Court of Justice of the European Union, *Maximilian Schrems v. Data Protection Commissioner*, Case C-362/14, Judgment of the Court (Grand Chamber), 6 October 2015, ECLI:EU:C:2015:650.

⁶³ Alicja Brodzka, *supra* 42, at p.30.

⁶⁴ Administrative Cooperation Directive, Article 5 *juncto* Article 20(1).

⁶⁵ Administrative Cooperation Directive, Article 20(2).

⁶⁶ Administrative Cooperation Directive, Article 7(1).

⁶⁷ Administrative Cooperation Directive, Article 18(1).

⁶⁸ Administrative Cooperation Directive, Article 18(2).

Meanwhile, both the spontaneous exchange of information and automatic exchange of information use standard computerized format based on the existing format used in the Savings Directive, including its entailing mechanisms of administrative notification and feedback.⁶⁹ Practical arrangements within the Administrative Cooperation Directive require that any information communicated through any mode is conducted by electronic means using the Common Communication Network (CCN network).⁷⁰ The network, which has legal bases in Decision Number 1482/2007/EC and Decision No 624/2007/EC,⁷¹ supports for communications by way of message-based interface, interactive access, and email system, which includes national administration and EU officials as data subjects.⁷²

An issue may arise when information exchange cooperation involves data transmission from and to third states. As a rule of thumb, information received by Member State by virtue of an agreement with third country and may be useful for the enforcement of domestic tax laws of another Member State, may be transmitted to that other Member State, in so far as it is not restricted by the mentioned agreement.⁷³ The Most Favored Nation clause in Article 19 of Administrative Cooperation Directive also obliges Member State having wider cooperation with third states to extend such cooperation with the other Member States. This may increase the inbound flow of information into the EU. Vis-à-vis, competent authorities of a Member State may transmit information it receives from another Member State to a third country, provided that that other Member State has given its consent to such transmission, and that that third country has sufficiently establish “(...) the irregular or illegal nature of transactions which appear to contravene or constitute an abuse of tax legislation”,⁷⁴ or in other words, having a legitimate aim to use the information. Again, protection of taxpayers data have been thought of by the EU organs.

Based on the elaboration in sub-subsection 2.3.a, it can be concluded that while proceedings conducted by tax authorities of Member States may be beyond taxpayers’ ownership interests, rules and instruments on information exchange cooperation have been designed as to ensure that every information exchanged is safely transmitted within the EU borders. Transmission to states outside the EU borders are only possible with restrictions, while incoming information from third states have been made lenient. This divergent interpretation of reciprocity with third country marks the EU’s convergent view towards efficient yet secured tax information exchange within its borders.

2.3.b. Limitations on personal information for information exchange cooperation purposes

Several aspects of limitations on information exchange has been mentioned in the above sub-sections. In this sub-section, further limitations on the functioning of the information exchange cooperation will be discussed. First, Article 25 of the Administrative Cooperation Directive confers:

All exchange of information pursuant to this Directive shall be subject to the provisions implementing Directive 95/46/EC. However, Member States shall, for the purpose of the correct application of this Directive, restrict the scope of the obligations and rights provided for in Article 10, Article 11(1), Articles 12 and 21 of Directive 95/46/EC to the extent required in order to safeguard the interests referred to in Article 13(1)(e) of that Directive.

⁶⁹ Administrative Cooperation Directive, Article 20(3) *juncto* Article 20(4).

⁷⁰ Administrative Cooperation Directive, Article 21(1). The CCN is developed by the Union for all transmissions by electronic means between competent authorities in the areas of customs and taxation (Article 3 point 13).

⁷¹ Decision Number 1482/2007/EC of the Parliament and of the Council of 11 November 2007 establishing a Community programme to improve the operation of taxation systems in the internal market (Fiscalis 2013); Decision No 624/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing an action programme for customs in the Community (Customs 2013). See also: Commission Implementing Regulation (EU) 2015/2378 of 15 December 2015 laying down detailed rules for implementing certain provisions of Council Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Implementing Regulation (EU) No 1156/2012, [2015] OJ L332/19.

⁷² The European Commission, *Data Protection officer–DPO-3318.3 CCN user management*, available at <http://ec.europa.eu/dpo-register/details.htm?id=38087> [last access on 20 June 2017].

⁷³ Administrative Cooperation Directive, Article 24(1).

⁷⁴ Administrative Cooperation Directive, Article 24(2).

This provision serves as the general data protection rule for the information exchange. It makes reference to the previous GDPR. In short, the cross-referenced provisions refer to the prudential acts of the controller when receiving and transmitting information, the data subject's rights to access the processed information, and Member States' obligations to publicize the processing of data. Applied contextually to the information exchange cooperation, Article 25 of the Administrative Cooperation Directive confines that applications of the GDPR provisions may be derogated for the purpose of safeguarding "(...) an important economic or financial interest of a Member State or of the European Union, including monetary, budgetary and taxation matters."⁷⁵ While the information exchange modes are protected by the use of CCN, taxpayers' right to access the processed information and the publications of processing by Member States remain uncertain.

Second, Article 16(1) of the Administrative Cooperation Directive confers that information communicated within the information exchange cooperation of any modes should enjoy official secrecy and protection to similar information in accordance with national laws of the Member States. As such, the use of information received within that cooperation is limited to: a) administration and enforcement of domestic laws of the Member States concerning taxes listed in the Directive; b) assessment and enforcement of taxes listed within the Mutual Assistance Directive; c) assessment and enforcement of compulsory social security contributions; d) judicial and administrative proceedings resulted from infringements of tax laws; and e) invocation as evidence by the competent authorities of Member States by virtue of national treatment.⁷⁶

Third, equally important limitations on the operation of information exchange cooperation is that any information requested by a requesting authority of a Member State must be on the basis that such authority has "(...) exhausted the usual sources of information which it could have used in the circumstances for obtaining the information requested, without running the risk of jeopardizing the achievement of its objectives."⁷⁷ In addition, the requested authority of a Member State may decline any transmission of information if: a) it would be contrary to its legislation to collect such information or administrative enquiries thereof (Article 19(2)); b) the requesting Member State fails to provide similar information under its domestic tax laws (Article 19(3)); and c) it would lead to disclosure of a commercial, industrial or professional secret or of commercial process, or of information which disclosure would be against the public policy (Article 19(5)).

Based on the above elaboration in sub-subsection 2.3.b., it can be concluded that limitations against information exchange cooperation are having the purpose to balance the vast power attributed to tax authorities of Member States in acquiring information regarding taxpayers. It is conclusive that any information concerning taxpayers other than their ownership interests on business secrets⁷⁸ may be acquired and transmitted for information exchange purposes. Procedural limitations on the acquisition and utilization of such information ensure that processing of information do not go beyond what is necessary to attain the objectives of administration and enforcement of Member States' tax laws. Coherently, secure transmission of information ensure that information concerning taxpayers are not intervened or misused by unauthorized parties. Furthermore, it can also be concluded that the taxation purpose of information exchange cooperation requires the balancing of competing interests between safeguarding proper functioning of Member States' budgetary systems and the need to protect acquisition and information of personal data. Provisions of the Administrative Cooperation Directive have been designed as to provide tax authorities with wide array of evidence when enforcing their domestic tax laws, but at the same time being coherent to the EU-wide secondary laws concerning protection of data.

⁷⁵ Article 13(1)(c) of Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, [1995] OJ L 281/31.

⁷⁶ Administrative Cooperation Directive, Article 16(1) *juncto* Article 16(5).

⁷⁷ Administrative Cooperation Directive, Article 17(1).

⁷⁸ In the case of corporate groups operating in different Member States, it is likely that commercial secrets and industrial or professional secret or of commercial process will be subject to laws on transfer pricing documentation.

Based on the elaborations in this subsection 2.3, it can be concluded that the EU tax transparency agenda takes into account protection of taxpayers data to the extents expressly governed in the Administrative Cooperation Directive and the GDPR. As a rule of thumb, the qualities and quantities of taxpayers data and information acquired and transmitted within the exchange of information are indefinite insofar as other limitations are fulfilled. These limitations include: a) the legitimate use of information as to prevent casual and general use of personal data; b) the proportionate acquisition of information as to prevent abuse of power by tax authorities when acquiring and transmitting information; and c) the secure transmission of information as to prevent misuse by unauthorized parties. Another important limitation is the secure transmission of information acquired in the EU to third states. In order to enhance protection of taxpayers data, due regards may be attributed to the specification of information that can be acquired and transmitted within the cooperation. An exhaustive list of transmissible information will provide more legal certainty for taxpayers.

3. Conclusion

Based on the elaborations in the previous sections, and as the answer to the central question of this paper, it can be concluded that the CRB can be used as a model instrument in unveiling beneficial owners for tax treaty purposes, for three reasons. First, data and information stored in the CRB are comprehensive, as they include details on the legal and economic nature of cross-border business. Second, data and information stored in the CRB are transparent and have practical uses, as persons with legitimate interests may, with limitations, be granted access to the CRB. Such limited access to the CRB results in the third reason to propose CRB as a model instrument in unveiling beneficial owners, namely that the CRB ensures high protection of individuals' privacy. The established links amongst rules and regulations on exchange of information for tax purposes, data protection, and anti-money laundering have improved the usefulness of the CRB in unveiling beneficial ownership for tax purposes. Third, protection of taxpayers' privacy is ensured by measures to prevent misuse of taxpayers information, including rules and instruments on safe transmission of information. It should be born in mind that data and information stored in the CRB are not in themselves able to solve the issue as whether an interposed person is beneficial owner of certain income distributed through it, because determination of beneficial ownership for tax treaty purposes require scrutiny of factual circumstances that might not be recorded in the CRB.